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No. 83-1015

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, etc., *et al.*,

Appellants,

v.

HAMPTON COUNTY ELECTION COMMISSION, etc., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

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Appellants submit this Reply Brief in response to the motions to dismiss or affirm filed on behalf of the Hampton County Election Commission and the Hampton County School Districts Nos. 1 and 2 and

the members thereof. Since the decision below, and the arguments of appellees, turn a substantial degree on the legal significance of a decision by the Attorney General to preclear a statute under section 5 of the Voting Rights Act, we suggest that it might be appropriate for the Court to request the views of the United States regarding this appeal.

In our Jurisdictional Statement we urged that the decision of the district court would radically alter the scope and effectiveness of section 5 of the Voting Rights Act. Neither of the appellees disagree with our reading of the decision below. Rather, the appellees expressly and enthusiastically endorse the new exceptions to section 5 established by the district court and urge their approval by this Court.

The Election Commission asserts that

the decision below adopts a "principle of retroactive approval"[1/], pursuant to which approval of a change in election law under section 5 automatically approves nunc pro tunc all violations of the Voting Rights Act occasioned by the illegal implementation of that new state law. The Commission urges, in addition, that the Attorney General of the United States has expressly endorsed this principle, and that in approving a change in election law under section 5 it is in fact the intent of the Attorney General to approve all related violations of federal law, regardless of whether he may not know that those violations occurred.[2/]

Six years ago Justice Brennan warned that, if section 5 approval automatically

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1/ Election Commission, Motion , p. 17.

2/ Id. pp. 11-16.

carried with it retroactive approval of past violations, there would be little reason to obey section 5 at all. Berry v. Doles, 438 U.S. 190, 194 (1978). The Commission agrees. It urges that, so long as Act 547 had not yet been rejected by the Attorney General under section 5, local officials would have been "derelict in their duty"[3/] if they had failed to enforce that change in election law. Even after the Attorney General disapproved Act 547, further implementation, the Commission asserts, was "necessitat[ed]" by the fact that a request for reconsideration was pending.[4/] In the Commission's view the decision below not merely permits but requires local authorities to implement an unapproved change in election law in

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3/ Election Commission Motion, p. 10.

4/ Id. 17. n.2.

violation of the Voting Rights Act so long as there is any hope that that violation will later be forgiven under the "principle of retroactive approval." Because of this principle, the Commission asserts, the issuance of an injunction against the holding of an election which lacks section 5 preclearance should be "the exceptional remedy rather than the normal one."[5/]

In making this argument, the Commission ignores now, as it has ignored throughout this case, the express language of section 5. The statute says that a covered voting change may not be enforced "unless and until" it is precleared. As shown by the Senate and House Committee Reports accompanying the 1982 extension of the Act, cited at pp. 14-15 of our Juris-

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5/ Id. 12 n.1.

dictional Statement, Congress has made plain the importance it attaches to those words.

The School Districts read the decision below as holding that section 5 preclearance entails, not only the granting of a blanket pardon of all past violations of federal law,[6/] but also the issuance of a prospective indulgence forgiving in advance changes in election laws which may later be made in connection with the implementation of an approved statute. How a new statute is to be implemented, even where that decision involves such important questions as candidate qualifications, is said to be a matter of "administrative discretion"[7/] apparently outside the scope of section 5. Even though the County Election Commission

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6/ School Board Motion, pp. 16-17.

7/ Id. p. 14.

itself did not know whether to hold an off-year election under state law, and had to seek legal advice from state officials, the School Districts insist that the Attorney General somehow foresaw what that advice would be, and by his letter of November 19 1982, implicitly approved in advance the decision of January, 1983 to hold such a special election.[8/] We agree with the School Districts that the decision below appears to give to a preclearance decision the effect of approving all changes in election law that may later be made in the implementation of that law, regardless of whether the Attorney General knew or could have known that such changes would occur. Nothing in the Voting Rights Act or applicable regulations, however, suggests that the Attorney General intends to "approve" changes which were never submit-

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8/ Id. at 18.

ted for preclearance or about which he had no knowledge.

CONCLUSION

This Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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